CRIMINAL PROCEDURE—ALIBI INSTRUCTIONS AND DUE PROCESS OF LAW

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INTRODUCTION

There is a controversy among the United States courts of appeals as to whether the Due Process Clause of the United States Constitution requires a trial court to issue a jury instruction on the burden of proof for an alibi defense. An “alibi instruction” informs the jury that the prosecution has the burden of disproving the defendant’s alibi beyond a reasonable doubt and that the defendant does not have the burden of proving the alibi.

1. The Fifth Amendment to the United States Constitution states that “[n]o person shall be... deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V. The Fifth Amendment protects individuals against the power of the federal government. See Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights limits federal power but does not limit state power). The Fourteenth Amendment states that “[n]o state shall... deprive any person of life, liberty, or property without due process of law” and protects individuals against the power of state governments. U.S. CONST. amend. XIV, § 1.

Courts have generally interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments identically, so that procedural due process rights are entitled to the same protection in federal and state criminal trials. See George Kannar, Comment, The Constitutional Catechism of Antonin Scalia, 99 YALE L.J. 1297, 1349 (1990) (“Theories concerning the interpretation of the Fourteenth Amendment’s due process clause apply, of course, in almost identical fashion to the interpretation of the same language in the Fifth Amendment.”); Albert W. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 MICH. L. REV. 510, 520 n.46 (1986) (“The Supreme Court has declared that the two clauses, although adopted in different historical contexts, have the same meaning.” (citations omitted)); Michael Conant, Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined, 31 EMORY L.J. 785, 821 n.164 (1982) (“Since the language of due process in the Fourteenth Amendment was adopted from the Fifth Amendment, the rules of documentary interpretation require that the Clauses have the same meaning.” (citation omitted)).

2. An alibi is “[a] defense that places the defendant at the relevant time of crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party.” BLACK’S LAW DICTIONARY 71 (6th ed. 1990) (citation omitted).


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In *United States v. Hicks*, the United States Court of Appeals for the Fourth Circuit held that a trial court's failure to give the jury an alibi instruction, when the alibi is supported by any evidence, violates the defendant's due process right under the Constitution and that any such violation should be assessed to determine whether it is harmless. At the other extreme, the United States Court of Appeals for the Third Circuit, in *United States v. Simon*, held that a trial court is not constitutionally required to give an alibi instruction and that a federal court of appeals has the discretion to make a "supervisory" rule to decide the issue for itself. The United States Court of Appeals for the Ninth Circuit, in *Duckett v. Godinez*, took an intermediate position by holding that the determination of whether due process is violated by a court's refusal to give an alibi instruction depends on the totality of instructions given to the jury as well as the evidence offered at trial. The Court of Appeals for the Sixth Circuit, in *Presley v. Rees*, expressed a view that is consistent with *Duckett* on whether an alibi instruction is constitutionally required. Neither the United States Supreme Court nor the courts of appeals for the remaining circuits have considered this issue.

This Note addresses the issue of whether the Due Process Clause imposes an unconditional requirement on a trial court to give the jury an alibi instruction or whether it imposes a conditional requirement, based on the results of a test, to give the instruction. The former approach, adopted by the Fourth Circuit in *Hicks*, will be referred to in this Note as a "per se error" theory. Under this approach, failure to give the instruction is a per se constitutional error. The latter approach, exemplified by the Ninth Circuit in *Duckett* and the Sixth Circuit in *Presley*, will be referred to as a "conditional error" theory. Under the "conditional error" approach, whether a trial court committed a constitutional error by

4. 748 F.2d 854 (4th Cir. 1984).
5. See id. at 857-58. See infra note 17 for an explanation of the "harmless error" doctrine.
6. 995 F.2d 1236 (3d Cir. 1993).
7. See id. at 1244-45. However, the *Simon* opinion does not define the term "supervisory."
8. 67 F.3d 734 (9th Cir. 1995).
9. See id. at 745.
11. See id. at *1-2 (holding that the defendant's due process rights were not violated in consideration of the overall instructions to the jury, physical evidence against the defendant, victim's identification of the defendant, and defendant's witnesses in support of his alibi defense).
failing to give the jury an alibi instruction depends on the outcome of a test.\textsuperscript{12} This Note does not examine the "no error" theory of the Third Circuit, since the Simon opinion does not provide any support for this approach and does not address the contrary views of the Fourth and Sixth Circuits that preceded it.

Part I of this Note provides an introduction to theory of defense\textsuperscript{13} instructions and to the alibi instruction in particular. Part II discusses the principal alibi instruction cases that frame the issue to be resolved by this Note: whether the Due Process Clause imposes an unconditional requirement on a trial court to give the jury an alibi instruction or whether it imposes a conditional requirement, based on the results of a test, to give the instruction.

Part III develops three arguments which support the "per se error" theory. The first argument contends that a trial court's failure to instruct the jury on the defendant's alibi unconstitutionally shifts the burden of proof for the alibi to the defendant.\textsuperscript{14} The second argument analogizes failure to give an alibi instruction to failure to give a reasonable doubt instruction, which is a due process error.\textsuperscript{15} The third argument compares the failure to give an alibi instruction with the giving of a Sandstrom burden-shifting instruction, which violates due process.\textsuperscript{16} Additionally, this Part contends that, under the "per se error" approach, the constitutional error of not giving the jury an alibi instruction is subject to the harmless error test developed by the United States Supreme Court in Chapman v. California.\textsuperscript{17}

Part IV develops support for the "conditional error" approach by showing that alibi instructions are analogous to presumption of

\begin{itemize}
  \item \textsuperscript{12} See infra Part IV.C.2 for a discussion of why the appropriate test for the "conditional error" approach is a "totality of circumstances" test.
  \item \textsuperscript{13} A theory of defense formulates the legal basis of a defense that a criminal defendant presents at trial.
  \item \textsuperscript{14} See infra Part III.A for the first argument in support of a "per se error" theory.
  \item \textsuperscript{15} See infra Part III.B for the second argument in support of a "per se error" theory.
  \item \textsuperscript{16} A Sandstrom instruction, which originated in Sandstrom v. Montana, 442 U.S. 510 (1979), shifts the burden of persuasion to the defendant on the element of intent. See infra Part III.C for a discussion of the Sandstrom case and for the third argument in support of a "per se error" theory.
  \item \textsuperscript{17} 386 U.S. 18 (1967). Under the constitutional harmless error doctrine enunciated in Chapman, a defendant's conviction is reversed if after having determined that a constitutional error occurred during the trial, the reviewing court concludes that the error was not harmless. See id. at 22. See infra Part III.D for a discussion of why a harmless error test is required under a "per se error" approach.
\end{itemize}
innocence instructions and that presumption of innocence instructions are conditionally required by due process on the basis of a test. This Part also argues that, under the “conditional error” approach, a harmless error inquiry is not required.

After weighing the “per se error” approach against the “conditional error” approach, in Part V, this Note concludes that a trial court’s failure to issue a requested alibi instruction, where there is evidentiary support for the alibi, is a per se constitutional error subject to harmless error review.

I. BACKGROUND ON THEORY OF DEFENSE INSTRUCTIONS

This Part introduces constitutional rights relating to a criminal defendant’s theory of defense from the perspective of both the United States Supreme Court and the federal courts of appeals, with particular emphasis on alibi defenses and instructions.

A. Theory of Defense

A defense is a “set of identifiable conditions or circumstances which may prevent a conviction for an offense.”18 Defenses may be divided into categories. One category is a “failure of proof” defense, which serves to negate an element of the alleged crime.19 An alibi20 is a failure of proof defense that negates the actus reus, or conduct, element.21

Since a criminal defendant has a fair trial right under the Due Process Clause22 to present a complete defense,23 an important issue is whether a trial court is required, under due process, to instruct the jury on the defendant’s theory of defense. Both the United States Supreme Court and federal courts of appeals have

19. See id. at 204.
20. See supra note 2 for a definition of an alibi defense.
23. See California v. Trombetta, 467 U.S. 479, 485 (1984) (“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.”).
considered whether a court is required to give the jury an instruction on the defendant's theory of defense. In *Mathews v. United States*, the Supreme Court stated that "[a]s a general proposition a defendant is entitled to [a jury] instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." However, the *Mathews* court did not base this rule on the United States Constitution.

Similarly, most federal courts of appeals consider a defendant to be entitled to a jury instruction on any theory of defense having evidentiary support, including the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Sev-

25. *Id.* at 63 (citing *Stevenson v. United States*, 162 U.S. 313 (1896)). In *Mathews*, the district court convicted a federal employee for the federal crime of accepting a bribe in return for granting governmental favors. *See id.* at 60-62. After the court of appeals affirmed, the Supreme Court reversed the conviction because the district court denied the defendant's request for an entrapment defense instruction on the erroneous grounds that the entrapment defense is inconsistent with the defendant's denial of having committed the crime. *See id.* at 62. The Supreme Court held that a defendant who denies commission of the charged crime is entitled to an entrapment instruction if there is sufficient evidence to support a finding of entrapment by the jury. *See id.*
26. *Mathews* based the rule on *Stevenson v. United States*, 162 U.S. 313 (1896). *See Mathews*, 485 U.S. at 63. *Stevenson* held that there was sufficient evidence to justify instructions for both manslaughter and self-defense in spite of the inconsistency of these two defenses. *See Stevenson*, 162 U.S. at 323. However, *Stevenson* was silent as to whether its holding had a constitutional basis.
27. *See United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992) ("It is hornbook law that an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it.") (quoting United States v. Rodriguez, 858 F.2d 809, 812 (1st Cir. 1988))). In *McGill*, the defendant was convicted of willful federal income tax evasion and appealed on grounds that the district court failed to give the defendant's requested instruction that he could not "be held criminally liable if in good faith he misunderstood the requirements of [the] law, or in good faith believed that his income was not taxable." *Id.* at 12. The court of appeals held that the district court adequately communicated the defendant's theory of defense by giving instructions to the jury in words other than those requested by the defendant. *See id.* at 12-13.
28. *See United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992) ("A criminal defendant is entitled to have instructions presented related to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.") (quoting United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956))).
29. *See United States v. Santos*, 932 F.2d 244, 250 (3d Cir. 1991) ("Clearly a defendant is entitled to a jury instruction on a theory of defense whenever some evidence supports that theory . . . .") (quoting United States v. Kapp, 781 F.2d 1008, 1013 (3d Cir. 1986))).
30. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1354 (4th Cir. 1995) ("If a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it.").
31. *See United States v. Johnson*, 872 F.2d 612, 622 (5th Cir. 1989) ("When a
Eighth, Ninth, and Tenth Circuits, where the evidentiary-support requirement varies among the federal circuits. The Eleventh Circuit has the additional requirement that "a refusal to give a requested [theory of defense] instruction is an abuse of discretion if . . . the failure to give the instruction seriously impair[s] the defendant's ability to present an effective defense." Notwithstanding the varying standards of required evidentiary support for an alibi, the otherwise consistent opinions of the federal courts of appeals suggest that failure to give the jury an instruction on the defendant's theory of defense may be a constitutional due process error. In particular, the Fourth and Ninth Circuits, which are circuits that disagree on the focal issue of this Note (whether an alibi instruction is constitutionally required), both agree that a theory of defense instruction is constitutionally required.

32. See United States v. Newcomb, 6 F.3d 1129, 1132 (6th Cir. 1993) ("[S]o long as there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense.'" (quoting United States v. Plummer, 789 F.2d 435, 438 (6th Cir. 1986))).

33. See United States v. Howell, 37 F.3d 1197, 1203 (7th Cir. 1994) ("The defendants are entitled to a theory of defense instruction if (1) they propose a correct statement of the law; (2) their theory is supported by the evidence; (3) their theory is not part of the charge; and (4) the failure to include an instruction on defendants' theory of defense would deny defendants a fair trial." (citing United States v. Elder, 16 F.3d 733, 738 (7th Cir. 1994))).

34. See United States v. Meyer, 808 F.2d 1304, 1306-07 (8th Cir. 1987) ("A criminal defendant is entitled to a 'theory of defense' instruction if the instruction correctly states the law and the facts in evidence support the theory." (citing United States v. Richmond, 700 F.2d 1183, 1195-96 (8th Cir. 1983))).

35. See United States v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996) ("A defendant is entitled to an instruction on his theory of the case 'provided that it is supported by law and has some foundation in the evidence.'" (quoting United States v. Dees, 34 F.3d 838, 842 (9th Cir. 1994))); see also United States v. Escobar de Bright, 742 F.2d 1196, 1201 (9th Cir. 1984) ("The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error.")

36. See United States v. Scafe, 822 F.2d 928, 932 (10th Cir. 1987) ("A defendant is entitled to jury instructions on any theory of defense finding support in the evidence and the law, and the failure to so instruct is reversible error." (citing United States v. Lofton, 776 F.2d 918, 920 (10th Cir. 1985))).

37. United States v. Sirang, 70 F.3d 588, 593 (11th Cir. 1995) (citing United States v. Morris, 20 F.3d 1111, 1115-16 (11th Cir. 1994)).

38. The Fourth Circuit stated that "a defendant . . . is constitutionally entitled to [a defense] instruction . . . if the evidence supports it." Kornahrens v. Evatt, 66 F.3d 1350, 1354 (4th Cir. 1995). The Ninth Circuit stated that "[t]he right to have the jury instructed as to the defendant's theory of the case is . . . basic to a fair trial." Escobar de Bright, 742 F.2d at 1201. A right to a fair trial is a due process right. See supra note 22.
The Mathews rule and the positions of the federal courts of appeals suggest that a defendant has a right to a theory of defense instruction. Nevertheless, the United States Supreme Court has not declared this right to be based on the United States Constitution. Therefore, if a defendant has a constitutional right to an alibi instruction, the right is not derived from a more general constitutional right to a theory of defense instruction, but must be based on the unique characteristics of the alibi defense itself.

B. Alibi Defense

An alibi places a defendant at a location that negates the possibility that the defendant committed the crime.

It is said that an alibi, if established, constitutes a complete, legitimate, and effective defense, and that it precludes the possibility of guilt. It is also said that an alibi is the most perfect, physically conclusive evidence of the accused's innocence, and, since it is a complete defense by itself, that it is neither helped nor hurt by other defenses.

An alibi defense differs fundamentally from an affirmative defense. An affirmative defense requires proof of facts that are extrinsic to the elements of the charged offense. Thus, an affirmative defense, if successful, releases the defendant from criminal liability even if the prosecution proves all of the elements of the offense beyond a reasonable doubt. Entrapment is an example of an affirmative defense. With entrapment, the defendant is entitled to acquittal, even if the prosecution proves all the elements of the crime, if it is proved that the government induced the defendant to commit the crime and the defendant is not predisposed to commit the type of offense.

39. See United States v. Zuniga, 6 F.3d 569, 571 (9th Cir. 1993), for the categorization of alibi as a defense.
40. See United States v. Brooks, 25 M.J. 175, 178 (C.M.A. 1987) ("Alibi—which in Latin means 'elsewhere'—is a term applied to an accused's claim that he was at another place when the crime was committed."). See supra note 2 for an equivalent definition of alibi.
42. An affirmative defense "involves . . . excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." MODEL PENAL CODE §1.12(3)(c) (1962). "Excuses, like justifications, are usually general defenses applicable to all offenses even though the elements of the offense are satisfied." Robinson, supra note 18, at 221.
43. The Supreme Court has interpreted the Due Process Clause as requiring the prosecution to prove each element of a charged offense beyond a reasonable doubt. See infra note 141 and accompanying text.
crime charged. Other examples of affirmative defenses are self-defense and necessity.

An alibi defense, on the other hand, represents a negation of an element of the crime itself, namely the actus reus, or conduct, element. Since "the prosecution must prove the elements of the offense, it follows that the prosecution must disprove defenses that assert the non-existence of those elements."

An alibi instruction specifically informs the jury that the defendant is not required to prove an alibi defense and the prosecution is required to negate the alibi beyond a reasonable doubt. Federal courts of appeals have pattern jury instructions which the courts may use. For example,

[t]he defendant has introduced evidence to show that he was not present at the time and place of the commission of the offense charged in the indictment. The government has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place.

If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the

45. See id. at 63.

46. A person has the right to kill in self-defense in the face of an imminent, unlawful threat of deadly force directed against the defender who did not provoke the conflict. See United States v. Peterson, 483 F.2d 1222, 1224-26, 1229-30 (D.C. Cir. 1973) (holding that self-defense was not available to the defendant who shot and killed a trespasser on his property when the trespasser approached the defendant with a raised hand holding a lug wrench after the defendant, with a gun in his hand, warned the trespasser not to move).

47. Under necessity, a person is permitted to commit a crime in order to avoid an immediate harm to himself or to property that exceeds the harm associated with the unlawful act, provided that the situation was caused by natural forces and that no reasonable alternative exists. See Nelson v. State, 597 P.2d 977, 977-79 (Alaska 1979) (convicting defendant of reckless destruction of personal property, despite a necessity defense, for unlawfully taking a dump truck and a front-end loader from a highway equipment yard in order to free his truck which was stuck in a marshy area).

48. See Robinson, supra note 18, at 204, 208.

49. Id. at 259 n.224 (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 48 (1972)).

50. See supra notes 2-3 and accompanying text for the definition and purpose of an alibi instruction.

51. Pattern jury instructions are standard jury instructions that a jurisdiction adopts for its courts. See J. Clark Kelso, Final Report of the Blue Ribbon Commission on Jury System Improvement, 47 HASTINGS L.J. 1433, 1511-12 (1996). Such instructions are typically drafted by judges, state bar associations, law schools, and trial and defense lawyers associations. See id. at 1511. Pattern jury instructions are mandatory in some jurisdictions and optional in others. See id. at 1511-12.
crime was committed, you must find the defendant not guilty.52

This Note explores the issue of whether the Due Process Clause requires a trial court to issue an alibi instruction to the jury when requested to do so by the defendant.

II. THE CIRCUIT SPLIT AS TO WHETHER ALIBI INSTRUCTIONS ARE REQUIRED BY DUE PROCESS

The United States courts of appeals have divergent positions on the issue of whether an alibi instruction is constitutionally required. Three distinct views are represented by four federal circuits.

The Fourth Circuit, in United States v. Hicks,53 was the first federal circuit to consider the issue and held that failure to give an alibi instruction is a per se constitutional error subject to harmless error review.54 Subsequent to Hicks, the Sixth Circuit in Presley v. Rees,55 decided that a trial court’s due process obligation to give the jury an alibi instruction is not unconditional and depends on factors such as the overall instructions to the jury and on the evidence introduced during the trial.56 The Presley opinion did not mention the Fourth Circuit’s position in Hicks.

More recently, the Third Circuit, in United States v. Simon,57 held that a trial court is not constitutionally required to give an alibi instruction, even though the Third Circuit has a “supervisory” rule unconditionally requiring an alibi instruction.58 This Note does not discuss Simon in the text, nor does it analyze the position of the Third Circuit on the constitutional question, because the Simon opinion does not provide any support for its theory and does not address the contrary views of the Fourth and Sixth Circuits that preceded it.59

53. 748 F.2d 854 (4th Cir. 1984).
54. See id. at 857-58.
56. See id. at *1-2.
57. 995 F.2d 1236 (3d Cir. 1993).
58. See id. at 1244-45. However, the Simon opinion does not explain what it means by a “supervisory” rule.
59. The defendant, in Simon, was convicted in federal district court of first-degree murder and possession of a dangerous weapon. See id. at 1242. At trial, the defendant presented an alibi defense through the testimony of five witnesses. See id. at 1240. The government, joined by the defendant’s counsel, requested that the court give an alibi instruction to the jury, but the court refused. See id. at 1241. On appeal, the United
Most recently, the Ninth Circuit, in *Duckett v. Godinez*, stated a position similar to that of *Presley*. *Duckett* held that a trial court is required to give an alibi instruction if warranted by the totality of instructions given to the jury and the evidence offered at trial.

This Part describes the positions of the Fourth and Ninth Circuits in the *Hicks* and *Duckett* cases, respectively. The Sixth Circuit case of *Presley* is not discussed in the text because *Duckett* provides a much more comprehensive analysis of the same theory.

A. The "Per Se Constitutional Error" Approach of the Fourth Circuit

In *United States v. Hicks*, the United States Court of Appeals for the Fourth Circuit held that an alibi instruction is constitution-
ally required if any evidence supporting an alibi is offered. The defendant, Benjamin Hicks, was convicted in federal district court of armed bank robbery. Hicks did not testify at trial and did not call any witnesses to present an alibi defense. Nevertheless, the government offered evidence that when Hicks was arrested for the robbery, he stated that he was at his girlfriend's apartment between 11:15 a.m. and 4:30 p.m. on the day of the robbery which had occurred just before noon. Based on this evidence offered by the government, Hicks requested the district court to give the jury an instruction on his alibi, but the trial court refused.

Hicks appealed to the United States Court of Appeals for the Fourth Circuit. The appellate court asserted that a defendant is entitled to a jury instruction on any theory of defense having evidentiary support, regardless of whether the defendant or the government offered the evidence. The court stated the following:

Once it appeared that there was sufficient alibi evidence to permit the factfinder to pass on the issue, Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury: If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. . . . Failing to give the jury an alibi instruction was thus an error of constitutional magnitude, and under Chapman v. California, we can sustain Hicks' conviction only if we can say that the error was harmless beyond a reasonable doubt.

After deciding that Hicks' due process right was violated, the Hicks court listed events that would render such error harmless, including failure to request the instruction, overwhelming evidence of the defendant's guilt, and negligible evidentiary support for the alibi. The Hicks court concluded that the error was not harmless, since none of the listed events had occurred and it could not be ascertained beyond a reasonable doubt that the trial court's failure

64. See id. at 857-58.
65. See id. at 856.
66. See id. at 856-57.
67. See id. at 856.
68. See id. at 857.
69. See id.
70. Id. at 857-58 (citations omitted).
71. See id. at 858 (citing United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976)).
to give the alibi instruction did not contribute to the conviction. 72

B. The "Conditional Constitutional Error" Approach of the Ninth Circuit

_Duckett v. Godinez_ 73 was decided after _Hicks_. The _Duckett_ opinion cited _Hicks_ only for the fact that the Fourth Circuit is the sole circuit to hold that failure by a trial court to give an alibi instruction is a constitutional error. 74

In _Duckett_, Tony Duckett was convicted in Nevada state court of burglary and the murder of his uncle and aunt. 75 At trial, Duckett testified that he was with his brother and two friends when the murders occurred. 76 Duckett requested that the trial court instruct the jury on his alibi defense, but the court refused to do so. 77 After the Supreme Court of Nevada affirmed Duckett’s conviction, 78 Duckett filed a habeas corpus petition in the United Stated District Court for the District of Nevada, which was denied. 79 Duckett appealed to the Ninth Circuit Court of Appeals on grounds that the trial court’s refusal to give his requested alibi instruction violated his due process and fair trial rights. 80

The _Duckett_ court concluded that Duckett’s due process rights were not violated because the overall jury instructions included Duckett’s alibi defense by way of inference from the reasonable doubt instruction. 81 In deciding against Duckett, the Ninth Circuit acknowledged that a defendant has a right to an instruction on the defendant’s theory of defense, 82 but stated that “it is not reversible error to reject a defendant’s proposed instruction on his theory of

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72. See id. at 858.
73. 67 F.3d 734 (9th Cir. 1995).
74. See id. at 745.
75. See id. at 738.
76. See id.
77. See id. at 743. The following instruction was proffered, but not used:
The defendant has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.
_Duckett_ v. _Nevada_, 752 P.2d 752, 753 (Nev. 1988), _aff’d in part sub nom._ _Duckett_ v. _Godinez_, 67 F.3d 734 (9th Cir. 1995).
78. See _Duckett_, 752 P.2d at 754.
79. See _Duckett_, 67 F.3d at 738-39.
80. See id. at 743.
81. See id. at 745.
82. See id. at 743 (citing United States v. _Zuniga_, 6 F.3d 569, 571 (9th Cir. 1993); United States v. _Escobar de Bright_, 742 F.2d 1196, 1202 (9th Cir. 1984)).
the case if other instructions, in their entirety, adequately cover that defense theory.'"83 According to the Duckett court, whether a state court's failure to give an alibi instruction violates due process depends on the "totality" of instructions given to the jury and the evidence introduced at trial84 because "constitutionality [is] determined not by focusing on ailing instruction 'in artificial isolation' but by considering effect of instruction 'in the context of the overall charge.'"85

The trial court instructed the jury that the state is required to prove every material element of the charged offense beyond a reasonable doubt.86 From this reasonable doubt instruction, the Duckett court reasoned that the jury was impliedly told that "the state bore the burden of proving beyond a reasonable doubt Duckett's presence at the scene of the crime [and b]ecause the state bore this burden, Duckett clearly did not bear the burden of proving his absence from the scene."87 Additionally, the court noted that Duckett's evidentiary support for his alibi evidence was weak.88 Based on the overall instructions, which included the reasonable doubt instruction, and the weakness of Duckett's alibi evidence, the court concluded that the omission of the alibi instruction did not violate Duckett's due process rights.89 Thus, Duckett held that the determination of whether due process is violated by a court's refusal to give an alibi instruction depends on the totality of instructions given to the jury, as well as the evidence offered at trial.90

The Duckett court, while holding that an alibi instruction is not necessarily required by due process, indicated that an alibi instruction requested by the defendant is required for cases within the Ninth Circuit.91 The Duckett court cited United States v. Zuniga92 and several other Ninth Circuit cases93 in support of this requirement. In drawing upon the Zuniga opinion, the Duckett court

83. Id. at 743 (emphasis added) (quoting United States v. Mason, 902 F.2d 1434, 1438 (9th Cir. 1990)).
84. See id. at 745 (citing Cupp v. Naughten, 414 U.S. 141, 147 (1973)).
85. Id. (quoting Cupp, 414 U.S. at 147).
86. See id.
87. Id.
88. See id. at 746.
89. See id.
90. See id. at 745-46.
91. See id. at 743.
92. 6 F.3d 569, 570-71 (9th Cir. 1993).
93. See Duckett, 67 F.3d at 743-44 (citing United States v. Hairston, 64 F.3d 491, 494 (9th Cir. 1995); United States v. Hoke, 610 F.2d 678, 679 (9th Cir. 1980); United States v. Ragghianti, 560 F.2d 1376, 1379 (9th Cir. 1977)).
stated that in the Ninth Circuit, "when a specific alibi instruction is requested, it must be given" and "that instructions on the presumption of innocence, the government's burden of proving every element of the crime beyond a reasonable doubt, and the identification of the defendant as the perpetrator of the charged crime are not adequate substitutes for a specific alibi instruction." According to Duckett, the Ninth Circuit requires the alibi instruction "because, without it, there is a danger that the jury may interpret the defendant's failure to prove his alibi as proof of guilt." The Duckett court explained that the Ninth Circuit requires the alibi instruction, pursuant to its role of reviewing cases on direct appeal, to compel a trial court to follow sound judicial practice even though such practice is not required by the Constitution.

The Duckett court distinguished cases on direct appeal from the federal district court with those state court convictions reviewed on habeas petitions with regard to constitutional requirements. The court stated the following:

The fact that a jury instruction is inadequate by Ninth Circuit direct appeal standards does not mean a petitioner who relies on such an inadequacy will be entitled to habeas relief from a state court conviction. In habeas proceedings challenging state court convictions, relief is available only for constitutional violations. We have never held . . . that failure to give a specific alibi instruction is necessarily a constitutional violation.

Thus, the positions of the Fourth Circuit and the Ninth Circuit are diametrically opposed as to whether an alibi instruction is constitutionally required. The Fourth Circuit imposes an unconditional requirement on a trial court to give the instruction, while the Ninth Circuit conditions the necessity of giving the instruction on the result of a test involving the totality of instructions given to the jury and the evidence introduced at trial.

III. SUPPORT FOR THE "PER SE ERROR", APPROACH

The legal analysis in this Part supports the position that a trial court's failure to give the jury an alibi instruction, when the defend-

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94. Id. at 743 (citing Hairston, 64 F.3d at 494; Ragghianti, 560 F.2d at 1379).
95. Id. at 743-44 (citing United States v. Zuniga, 6 F.3d 569, 570-71 (9th Cir. 1993)).
96. Id. at 744 (citing Zuniga, 6 F.3d at 570).
97. See id.
98. Id. (citing Estelle v. McGuire, 502 U.S. 62, 71-72 (1991)).
ant provides the requisite evidentiary support for the alibi, is a per se constitutional error subject to harmless error review. Part III.A argues that a trial court’s failure to give the jury an alibi instruction unconstitutionally shifts the burden of proving the alibi to the defendant and is a per se due process error. Parts III.B and III.C add support to the “per se error” theory by analogizing alibi instructions to reasonable doubt instructions and to a related class of burden-shifting instructions. Part III.D contends that, under the “per se error” approach, the per se constitutional error of not giving the jury an alibi instruction is subject to harmless error review.

A. Shift of Burden for Proof of Alibi

This section supports a “per se error” theory by demonstrating that a trial court’s failure to instruct the jury on the defendant’s alibi unconstitutionally shifts the burden of proof for the alibi to the defendant. The analysis establishes the preceding proposition by parsing it into two components and supporting each component independently. First, the analysis argues, on the basis of the related cases of Stump v. Bennett99 and Johnson v. Bennett,100 that it is a due process error for a trial court to shift the burden of proof of an alibi to a defendant. Second, the analysis shows that cases decided by United States Courts of Appeals for the Second, Third, Fourth, Fifth, and Ninth Circuits hold that failure of a trial court to give the jury an alibi instruction shifts the burden of proving the alibi to the defendant.

In Stump, the defendant’s conviction of murder in an Iowa trial was affirmed by the Iowa Supreme Court.101 At trial, the defendant testified that he was driving on a highway while the crime was committed, and offered witnesses in support of this alibi defense.102 In a habeas corpus petition to the federal district court, the defendant claimed that the trial court violated his due process rights by instructing the jury that the defendant has the burden of proving his alibi by a preponderance of the evidence.103 After the district court denied the petition, the defendant appealed to the United States Court of Appeals for the Eighth Circuit, which held that the defendant was deprived of due process by the instruction.104 The
Eighth Circuit considered the instruction to be unconstitutional because it “shift[ed] the burden of persuasion on an essential element of the crime and thus require[d] the defendant to assume the onus of proving a negative averment, i.e., non-presence.” The effect of the instruction, according to the *Stump* court, was to negate the government’s requirement to prove the defendant’s presence at the crime scene.

The United States Supreme Court, in *Johnson v. Bennett*, considered the same issue as *Stump* with similar facts. In *Johnson*, the defendant was convicted of murder in an Iowa trial and presented witnesses during the trial to support his contention that he was 165 miles away from the crime scene at the time the murder occurred. The Eighth Circuit affirmed a district court rejection of a habeas corpus petition in which the defendant argued that the Iowa trial court violated his due process right under the Fourteenth Amendment by instructing the jury that the defendant is required to prove his alibi defense by a preponderance of the evidence. The U.S. Supreme Court granted certiorari to hear this case to consider the constitutionality of the jury instruction. Rather than explicitly comment on the issue, the Supreme Court vacated the Eighth Circuit judgment in *Johnson*, because of the subsequent Eighth Circuit holding in *Stump v. Bennett* that the jury instruction is constitutionally prohibited. The Supreme Court stated the following:

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105. *Id.* at 120.
106. *See id.*
108. *See id.* at 253.
109. *See id.* at 254 (citing *Johnson v. Bennett*, 386 F.2d 677 (8th Cir. 1967)). The Iowa state trial court instructed the jury as follows:

The burden is upon the defendant to prove [the] defense [of alibi] by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant’s guilt, you should acquit him.

*Id.* at 254 n.1.
110. *See id.* at 254.
111. 398 F.2d 111 (8th Cir. 1968).
In this habeas corpus proceeding, petitioner argued, among other points, that the State had denied him due process of law by placing on him the burden of proving the alibi defense. The United States District Court for the Southern District of Iowa rejected this argument and denied the petition. The United States Court of Appeals for the Eighth Circuit affirmed. We granted certiorari to consider the constitutionality of the alibi instruction, along with other issues. After we granted certiorari the Court of Appeals for the Eighth Circuit, sitting en banc, held in another case that the Iowa rule shifting to the defendant the burden of proving an alibi defense violates the Due Process Clause of the Fourteenth Amendment. Stump v. Bennett, 398 F.2d 111 (1968). *In view of that holding*, we vacate the decision in this case and remand to that court for reconsideration.112

On the same day that it vacated *Johnson*, the Supreme Court denied certiorari in *Stump*.113 On remand, the Eighth Circuit reconsidered *Johnson* and reversed the defendant's conviction on grounds that the instruction was constitutionally prohibited inasmuch as the factual distinctions between *Johnson* and *Stump* had no legal significance.114 Thus, the United States Supreme Court in *Johnson* impliedly approved of the holding in *Stump* that it is a violation of the Due Process Clause to shift the burden of proof for an alibi to a defendant. Federal and state courts concur with this interpretation of the Supreme Court's action in *Johnson v. Bennett*.115

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112. *Johnson*, 393 U.S. at 254-55 (emphasis added) (citations omitted) (citing Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968)).

113. See *Bassett v. Smith*, 464 F.2d 347, 349 (5th Cir. 1972), for the statement that the Supreme Court vacated *Johnson* and denied certiorari in *Stump* on the same day, namely December 16, 1968.


115. Federal courts have cited *Johnson v. Bennett*, 393 U.S. 253 (1968), for the proposition that it is a due process violation to shift the burden of proof for an alibi to the defendant. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 131 n.39 (1982); *United States v. Robinson*, 602 F.2d 760, 762 (6th Cir. 1979); *Bassett v. Smith*, 464 F.2d 347, 349 (5th Cir. 1972). State courts are in accord with this interpretation. See *Grace v. State*, 200 S.E.2d 248, 257 (Ga. 1973) (discussing the violation of due process by shifting the burden of proof of an element of a crime and stating that “[a]lthough the Supreme Court has not had occasion to speak to this question, it is notable that the court vacated and remanded Johnson v. Bennett, 386 F.2d 677 (8th Cir. 1967), for further consideration in light of Stump v. Bennett”); *Thornton v. State*, 178 S.E.2d 193, 195 (Ga. 1970) (Felton, J., dissenting) (“I am of the opinion that the action taken by the Supreme Court of the United States remanding the case of Johnson v. Bennett . . . to the 8th Circuit Court of Appeals, was a direction to reverse the case under the circumstances.”); *Commonwealth v. French*, 259 N.E.2d 195, 232 (Mass. 1970) (“The Iowa rule discussed in the *Stump* case was construed in Johnson v. Bennett, as ‘shifting to the defendant the burden of proving an alibi defense.’” (citations omitted)).
Admittedly, there is a distinction between overtly shifting the burden of proof for an alibi by giving an explicitly erroneous instruction, as in *Stump* and *Johnson*, and refusing to give an alibi instruction altogether. Nevertheless, the United States Courts of Appeals for the Second, Third, Fourth, Fifth, and Ninth Circuits assert that a court's failure to give an alibi instruction impermissibly shifts the burden of proving the alibi to the defendant.116 Inasmuch as jurors are not legally trained, there is the danger that the jury will interpret the defendant's assertion of an alibi defense, coupled with the defendant's inability to persuade the jury that the alibi is true, as proof of the defendant's guilt.117 Arguably, a reasonable doubt instruction informs the jury that the prosecution must prove each element of the charged offense beyond a reasonable doubt.118 A reasonable doubt instruction, however, does not expressly inform the jury that the defendant is not obligated to prove his contention that he was elsewhere when the crime was committed. While a reasonable doubt instruction may *imply* that the defendant is not responsible for proving his alibi, jurors may not understand this implication.119 Empirical studies lend support to the proposition

116. See United States v. Zuniga, 6 F.3d 569 (9th Cir. 1993); United States v. Hicks, 748 F.2d 854 (4th Cir. 1984); United States v. Burse, 531 F.2d 1151 (2d Cir. 1976); United States v. Booz, 451 F.2d 719 (3d Cir. 1971); United States v. Megna, 450 F.2d 511 (5th Cir. 1971). In *Zuniga*, *Hicks*, *Burse*, and *Megna*, the courts of appeals each reversed a defendant's conviction because the trial court refused to give the jury an alibi instruction, thereby failing to alert the jury that the prosecution has the burden of proof as to the alibi and effectively shifting the burden of proof to the defendant. See *Zuniga*, 6 F.3d at 570, 572; *Hicks*, 748 F.2d at 857-58; *Burse* 531 F.2d at 1153; *Megna*, 450 F.2d at 513. In *Booz*, the defendant's conviction was reversed because the trial court refused to give the alibi instruction requested by the defendant and instead gave the jury an ambiguous alibi instruction followed by one that was overbroad, thereby confusing the jury as to the burden of proof for the alibi. See *Booz*, 451 F.2d at 723.

117. See *Zuniga*, 6 F.3d at 570 ("An alibi instruction is critical because a juror, unschooled in the law's intricacies, may interpret a failure to prove the alibi defense as proof of the defendant's guilt."); *Burse*, 531 F.2d at 1153 ("In those cases where an alibi defense is presented, there exists the danger that the failure to prove that defense will be taken by the jury as a sign of the defendant's guilt.").

118. See *infra* notes 137-42 and accompanying text for a discussion of the constitutional requirement of proving guilt beyond reasonable doubt for each element of an alleged crime and of giving the jury an instruction on the reasonable doubt standard.

119. The Ninth Circuit, in *Zuniga*, stated the following:

[A]n instruction ... must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case. Proof beyond a reasonable doubt as to the alibi never shifts to the accused who offers it, and if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt.
that jurors may have difficulty in understanding the implications of the reasonable doubt instruction.\textsuperscript{120} Furthermore, the Third Circuit views a reasonable doubt instruction, together with an instruction informing the jury that the burden of proof never shifts to the defendant, to still be insufficient in the absence of a clearly stated alibi instruction, because the jury may be confused as to the burden of proof.\textsuperscript{121} At least one court has held that a trial court’s refusal to charge on an alibi defense causes the most extreme possible shift of burden by “‘removing the issue from the jury’s consideration . . . [and] . . . direct[ing] a verdict on that issue against the defendant.’”\textsuperscript{122} Thus, an alibi instruction is necessary because it leaves no doubt as to the government’s burden of proof for the alibi.

In contrast with the preceding arguments, the Seventh Circuit held that an alibi instruction is redundant and unnecessary if the

\begin{quote}
\textit{Zuniga}, 6 F.3d at 570 (quoting United States v. Ragghianti, 560 F.2d 1376, 1379 (9th Cir. 1977)). The Second Circuit, in \textit{Burse}, also considered the effect of omitting an alibi instruction on the burden of proof when the reasonable doubt instruction was given:

In those cases where an alibi defense is presented, there exists the danger that the failure to prove that defense will be taken by the jury as a sign of the defendant’s guilt. . . . Even when the jury has been instructed as to the government’s burden, there remains the danger that the effect of the attempted alibi defense will be misunderstood. Only a specific instruction can insure that this problem will not occur.

\textit{Burse}, 531 F.2d at 1153.

\textsuperscript{120} See infra notes 129-31 and accompanying text for a discussion of empirical studies which conclude that jurors have difficulty in understanding their instructions, generally, and the reasonable doubt instruction in particular.

\textsuperscript{121} In \textit{Booz}, the court instructed the jury as to the government’s burden to prove the defendant guilty beyond a reasonable doubt and that this burden never shifts to the defendant. \textit{See Booz}, 451 F.2d at 722. In refusing to give the defendant’s requested alibi instruction, the trial judge gave a confusing alibi instruction which he attempted to offset with the following supplementary instruction:

\begin{quote}
It isn’t up to [the defendant] to prove anything. It is up to the government to prove its case. The defense may, if they wish, which they attempted to do in this case, but it isn’t required by the law. The law requires that the Government convince you beyond a reasonable doubt.
\end{quote}

\textit{Id.} at 723. The court of appeals, however, considered both instructions to be inadequate:

\begin{quote}
The insufficiency of the charge of the trial court is not cured by the more general language in the charge that the burden of proof never shifts from the government. . . . A defendant is entitled to specific instructions on the burden of proof on alibi issues because the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence. When affirmative proof, best known by the defendant himself, is offered, a likelihood exists that jurors would look to that proof for persuasion of its truth.
\end{quote}

\textit{Id.}

\textsuperscript{122} United States v. Hicks, 748 F.2d 854, 858 (4th Cir. 1984) (quoting United States v. Strauss, 376 F.2d 416, 419 (5th Cir. 1967)).
court instructs the jury that the prosecution must prove beyond a reasonable doubt that the defendant was at the scene of the crime. Similarly, the Ninth Circuit, in Duckett, held that the reasonable doubt instruction eliminated the need for a specific alibi instruction. Nevertheless, it is the special need to direct the jury's attention to the prosecution's burden of disproving the alibi that undercuts the argument in Duckett that a reasonable doubt instruction adequately instructs the jury on the defendant's alibi theory. While it is true that proof beyond a reasonable doubt that the defendant committed the crime logically cancels the defendant's alibi, there is no guarantee that the jury will not expect the defendant to prove the alibi as part of its overall consideration of whether the defendant is guilty beyond a reasonable doubt. Since a reasonable doubt instruction does not directly address the defendant's alibi defense, jurors must infer from the reasonable doubt instruction that the defendant is not obligated to disprove his alibi. On the basis of empirical studies, however, there is a likelihood that average jurors will not successfully engage in this reasoning process. Thus, an explicit alibi instruction is needed for assurance that the jury will understand the correct legal standard as to the burden of proof for the alibi.

There is empirical support for the positions of the Second, Third, Fourth, Fifth, and Ninth Circuits that an alibi instruction is required because jurors may not understand that the reasonable doubt instruction impliedly includes an instruction as to the burden of proof for the alibi. Studies undermine any assumption that

123. See Alicea v. Gagnon, 675 F.2d 913, 926 (7th Cir. 1982) ("Since the jury was informed that [defendant's] presence was necessary for conviction, nothing would have been added by instructing that his absence would require acquittal. Because such an instruction would have been redundant, we find no error in its omission.").

124. See supra note 87 and accompanying text for the assertion in Duckett that the reasonable doubt instruction enables the jury to infer that the defendant is not required to prove his alibi.

125. See supra notes 117-22 and accompanying text for the basis of this special need.

126. See supra note 117 for a discussion of why jurors may consider a defendant's inability to support his alibi to be proof of guilt.

127. See infra notes 129-31 and accompanying text for a discussion of empirical studies which conclude that jurors have difficulty in understanding their instructions, generally, and the reasonable doubt instruction in particular.

128. See supra notes 117-22 and accompanying text for the view of the Second, Third, Fourth, Fifth, and Ninth Circuits that, notwithstanding the reasonable doubt instruction, failure to give the jury an alibi instruction shifts the burden of proof to the defendant.
juries adequately understand their instructions.\textsuperscript{129} The results of three different studies show that jurors find it difficult to understand standard jury instructions.\textsuperscript{130} In another study, in Michigan, involving over 500 subjects and the participation of social scientists, judges, prosecutors, and defense attorneys, the subjects exhibited a low level of comprehension of jury instructions with especially poor performance on comprehension of the reasonable doubt instruction.\textsuperscript{131} It makes sense, therefore, to instruct jurors in the most direct and simple way possible.\textsuperscript{132} Accordingly, it is more probable that the jury will comprehend the prosecution's burden to disprove the defendant's alibi if an explicit alibi instruction is given than if the jury must obtain this understanding indirectly by inference from the reasonable doubt instruction.

Thus, the positions on "shift of burden" of the Second, Third, Fourth, Fifth, and Ninth Circuits, combined with the Eighth Circuit holding in \textit{Stump v. Bennett}\textsuperscript{133} and Supreme Court action in \textit{Johnson v. Bennett},\textsuperscript{134} adequately support a "per se error" theory. Under a "per se error" approach, a court's failure to instruct the

\textsuperscript{129} See Peter Meijes Tiersma, Reforming the Language of Jury Instructions, 22 Hofstra L. Rev. 37, 41-42 (1993). "Much research by linguists, psychologists and others has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decisionmaking." \textit{Id.} at 42.

\textsuperscript{130} See \textit{id.} at 42-44.

\textsuperscript{131} See Geoffrey P. Kramer & Dorean M. Koenig, Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project, 23 U. Mich. J.L. Reform 401, 405, 412-16, 429 (1990). For each of the following true/false statements, less than 35% of the participants gave correct answers after being instructed on reasonable doubt:

A REASONABLE DOUBT MUST BE BASED ONLY ON THE EVIDENCE THAT WAS PRESENTED IN THE COURTROOM, NOT ON ANY CONCLUSION THAT YOU DRAW FROM THE EVIDENCE.

\ldots

\ldots YOU HAVE A REASONABLE DOUBT IF YOU CAN SEE ANY POSSIBILITY, NO MATTER HOW SLIGHT, THAT THE DEFENDANT IS INNOCENT. IF SO, YOU SHOULD FIND THE DEFENDANT NOT GUILTY.

\ldots

\ldots TO FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT, YOU MUST BE 100% CERTAIN OF THE DEFENDANT'S GUILT.

\textit{Id.} at 414.

\textsuperscript{132} See Tiersma, \textit{supra} note 129, at 73 ("The most obvious way to ensure that jurors understand the law that guides their task is to continue efforts to write instructions that an average juror can understand.").

\textsuperscript{133} 398 F.2d 111 (8th Cir. 1968).

\textsuperscript{134} 393 U.S. 253 (1968).
jury on the defendant's alibi serves to unconstitutionally shift the burden of proof of the alibi to the defendant in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

B. Analogy to Reasonable Doubt Instructions

Whether a trial court's failure to give the jury an alibi instruction is a per se constitutional error or a conditional constitutional error can also be assessed by analogy to other jury instructions for which this determination has already been made by the United States Supreme Court. This section analogizes the alibi instruction to the reasonable doubt instruction and argues, on the basis of the analogy, that a trial court's failure to give the jury an alibi instruction is a per se constitutional error. The next section analogizes the alibi instruction to a related class of burden-shifting instructions and also contends, on the basis of the analogy, that a trial court's failure to give the jury an alibi instruction is a per se constitutional error. In this manner, these sections add to the support developed in Part III.A for the "per se error" theory. In contrast, Part IV analogizes alibi instructions to presumption of innocence instructions in support of a "conditional error" theory.

In *In re Winship*, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This constitutional protection reflects the fact that "proof beyond a reasonable doubt dates at least from our early years as a Nation" and protects


136. The analogy between alibi instructions and presumption of innocence instructions supports the view that a "conditional error" test governs whether a court's failure to give an alibi instruction is a constitutional error.


138. *Id.* at 364. In *Winship*, the New York Family Court found a 12-year old boy to have stolen $112 from a woman's pocketbook, based on proof by a preponderance of the evidence standard as dictated by § 744(b) of the New York Family Court Act. See *id.* at 359-60. The defendant's appeal, based on a claim that his due process rights were violated by the Family Court's use of the preponderance of the evidence standard of proof, was denied by both the Appellate Division of the New York Supreme Court and the New York Court of Appeals. See *id.* at 360. In reversing the conviction, the United States Supreme Court held that the reasonable doubt standard of proof is a per se requirement of due process that applies to juveniles as well as to adults. See *id.* at 365, 368.

139. *Id.* at 361.
against "dubious and unjust convictions, with resulting forfeitures of life, liberty and property."\textsuperscript{140} The Supreme Court has interpreted the \textit{Winship} holding as requiring proof for each element of the alleged crime.\textsuperscript{141} Additionally, the Supreme Court considers failure by a trial court to give the jury a reasonable doubt instruction, as to the required standard of proof for the charged offense, to be a per se violation of due process that can never be harmless error.\textsuperscript{142}

The application of \textit{Winship} to the alibi instruction is straightforward. The reasonable doubt instruction informs the jury that the government must prove each element of the charged offense beyond a reasonable doubt and the alibi instruction informs the jury that the government is required to disprove the alibi beyond a reasonable doubt.\textsuperscript{143} Since an alibi defense directly negates the actus reus, or conduct, element of the crime,\textsuperscript{144} and since it is a per se constitutional error if the trial court does not instruct the jury as to the burden of proof for the elements of the alleged crime,\textsuperscript{145} it is reasonable to consider that it is a per se constitutional error if the trial court fails to give the alibi instruction as to the burden of proof for the alibi. Although the reasonable doubt instruction logically includes the effect of the alibi, by requiring the government to prove beyond a reasonable doubt that the defendant was at the scene of the crime, this extension of \textit{Winship} is needed in order to focus the jury's attention on the government's burden of proof when the defendant introduces evidence concerning his whereabouts at the time the crime was committed.\textsuperscript{146} If the jury is not

\textsuperscript{140} \textit{Id.} at 362 (quoting \textit{Davis v. United States}, 160 U.S. 469, 488 (1895)).

\textsuperscript{141} See \textit{Victor v. Nebraska}, 511 U.S. 1, 5 (1994). In \textit{Victor}, the issue was whether the trial court's instruction defining "reasonable doubt" violated the Constitution. See \textit{id.} The \textit{Victor} opinion preceded its discussion of this issue with the statement that "[t]he government must prove beyond a reasonable doubt every element of a charged offense." \textit{Id.} (interpreting \textit{Winship}).


\textsuperscript{143} See \textit{supra} notes 2-3 and accompanying text for the definition and purpose of an alibi instruction.

\textsuperscript{144} See \textit{supra} note 21 and accompanying text for the proposition that the alibi serves to negate the actus reus element of an offense.

\textsuperscript{145} See \textit{supra} note 141 and accompanying text for the requirement, under the Constitution, that the prosecution must prove each element of a charged offense beyond a reasonable doubt. See \textit{supra} note 142 and accompanying text for the trial court's duty, under the Constitution, to give the jury a reasonable doubt instruction.

\textsuperscript{146} See \textit{supra} notes 117-22 and accompanying text for a discussion of the special need to give the alibi instruction even if the trial court instructs the jury that the prosecution must prove the elements of the charged offense beyond a reasonable doubt.
directly informed that the prosecution has the burden of proof for the alibi, the jury may think that the defendant is required to prove that the alibi is true. In recognition of this danger, the United States Courts of Appeals for the Second, Third, Fourth, Fifth, and Ninth Circuits require explicit alibi instructions in their respective circuits. Empirical studies, which demonstrate that juries have difficulty in understanding court instructions generally and the reasonable doubt instruction in particular, add support to the idea that an alibi instruction should be required. An explicit alibi instruction will effectively communicate to the jury that the prosecution, and not the defendant, has the burden of proof for the alibi. In contrast, a reasonable doubt instruction without an accompanying alibi instruction may not be successful in communicating this concept to the jury, since this mode of communication is indirect and requires that the jurors use a logical reasoning process to infer who has the burden of proof for the alibi.

In summary, failure by a trial court to give the jury an alibi instruction is analogous to a court's failure to give a reasonable doubt instruction, which violates due process. Therefore, failure by a court to give the jury an alibi instruction is a per se due process error.

C. Analogy to Sandstrom Burden-Shifting Instructions

Failure to give the alibi instruction can also be analogized to a class of constitutionally flawed instructions, enumerated in Sandstrom v. Montana, that erroneously shift the burden of proof for the mens rea element of the charged offense to the defendant. In Sandstrom, the defendant was convicted of "deliberate homicide," which required proof that he purposely or knowingly killed the victim. At trial, the court overruled the defendant's objection to the instruction that "'[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'" On appeal, the de-

147. See supra note 117-22 and accompanying text for a discussion of why the jury may view the defendant as having the burden to prove his alibi.
148. See supra notes 116-22 for a discussion of the consistent positions of the Second, Third, Fourth, Fifth, and Ninth Circuits that a trial court must give the jury an alibi instruction, since failure to do so impermissibly shifts the burden of proof for the alibi to the defendant.
149. See supra notes 129-31 and accompanying text for a discussion of empirical studies relating to the ability of jurors to understand their instructions.
151. See id. at 512-13.
152. Id. at 513 (quoting jury instruction).
dendant contended that the instruction erroneously shifted the burden of proof to him on the element of intent, in violation of the Due Process Clause. Nevertheless, the Supreme Court of Montana affirmed the conviction on grounds that the instruction merely required the defendant to present some evidence that he did not intend the ordinary consequences of his voluntary acts and, therefore, the instruction did not violate the Due Process Clause. After granting certiorari to decide the constitutionality of the instruction, the United States Supreme Court agreed with the defendant and reversed the conviction.

In holding that the erroneous instruction was a per se constitutional error, the Supreme Court explained that the presumption in the instruction, that a person intends the ordinary consequences of his voluntary acts, could be interpreted by the jury in four possible ways: as a permissive inference, mandatory presumption, conclusive presumption, or a burden-shifting inference. According to the Supreme Court, a permissive inference permits the jury to infer the defendant's intent from the defendant's conduct, while a mandatory presumption requires the jury to infer the requisite intent from the defendant's conduct unless the defendant offers contrary evidence. The government argued that permissive inferences and mandatory presumptions are not constitutional violations because they are rebuttable with only “some” evidence as needed to satisfy a burden of production rather than a burden of persuasion. The Supreme Court did not evaluate this constitu-

153. See id.
154. See id. at 513-14.
155. See id. at 514.
156. “A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.” Id. at 515 n.4 (quoting Mont. R. Evid. 301(a)). Presume is “‘to suppose to be true without proof.’” Id. at 517 (quoting Webster’s New Collegiate Dictionary 911 (1974)).
157. See id. at 514-15, 517.
158. See id. at 514.
159. See id. at 515.
160. See id. The burden of persuasion is the burden required to prove a claim to the jury. See Harry I. Subin et al., The Criminal Process: Prosecution and Defense Functions §1.4 (1993). The burden of production, also known as the burden of going forward, is the burden of providing some evidence to support a claim. See id. §§ 1.4, 1.7. The burden of production as applied to the defendant may be inconsequential in a criminal trial, however, since if the prosecution does not meet its burden, a directed verdict for the defendant results. See Sandstrom, 442 U.S. at 516 n.5. In contrast, if the defendant does not meet a burden of production, nothing happens since a court may not direct a verdict against a criminal defendant. See id. at 516 n.5.
tional argument, however, since the Supreme Court noted that the instruction at issue could have reasonably been interpreted more severely as a conclusive presumption or a burden-shifting inference.161 Under either interpretation, the instruction would be unconstitutional since it would relieve the prosecution of the burden of proving the element of intent beyond a reasonable doubt.162

In defining a conclusive presumption to be "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption,"163 the Supreme Court reasoned that a conclusive presumption would require the jury in Sandstrom to find that the defendant had the requisite intent upon determining that the defendant caused the death of the victim.164 The Supreme Court concluded that this would effectively direct the jury to find against the defendant as to intent, which would eliminate the requirement, under Winship, that the prosecution prove the element of intent beyond a reasonable doubt, thereby depriving the defendant of due process.165

The Supreme Court stated that a burden-shifting inference requires the jury "to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant prove[s] the contrary by some quantum of proof which may well [be] considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent."166 Thus, the Supreme Court found, under Winship, that a burden-shifting inference violates due process because it removes the government's burden of proving the defendant's intent beyond a reasonable doubt.167

Sandstrom is a natural extension of the holding in Winship in connection with the government's obligation to prove each fact that constitutes the charged offense beyond a reasonable doubt.168 Under Winship, the prosecution is required by the Due Process

161. See Sandstrom, 442 U.S. at 515-17.
162. See id. at 521.
163. Id. at 517.
164. See id. at 523.
165. See id.
166. Id. at 517.
167. See id. at 520-21.
168. The United States Supreme Court agrees with this interpretation of Sandstrom. See Rose v. Clark, 478 U.S. 570, 580 (1986) ("Sandstrom was a logical extension of the Court's holding in In re Winship, 397 U.S. 358 (1970), that the prosecution must prove 'every fact necessary to constitute the crime with which [the defendant] is charged' beyond a reasonable doubt.").
Clause to prove each element of an alleged crime beyond a reasonable doubt. Under *Sandstrom*, an instruction containing a presumption that undermines this burden of proof violates the Constitution.

Failure to give an alibi instruction is analogous to a burden-shifting inference contained within a *Sandstrom* instruction and undermines the prosecution's beyond a reasonable doubt burden of proof. While a *Sandstrom* instruction shifts the burden of proof as to the mens rea element regarding the defendant's intent, failure to give an alibi instruction shifts the burden of proof as to the actus reus element regarding the defendant's whereabouts. The burden of proof is shifted to the defendant when the alibi instruction is not given, because of the possibility that the jury will hold the defendant responsible for proving the truth of the alibi. The United States Courts of Appeals for the Second, Third, Fourth, Fifth, and Ninth Circuits each agree with this view, and therefore require an alibi instruction. Empirical studies lend credibility to this argument, because they demonstrate a high probability that a jury will not interpret a jury instruction correctly.

Admittedly, the burden-shifting mechanism in a *Sandstrom* instruction is within the text of the instruction itself, while failure to give an alibi instruction shifts the burden of proof indirectly by not focusing the jury's attention on the prosecution's burden of proof for the alibi. In other words, a *Sandstrom* instruction leads the jury in a wrong direction, while not giving an alibi instruction fails to

169. See *supra* note 141 and accompanying text for support of the constitutional requirement that the prosecution must prove each element of an alleged crime beyond a reasonable doubt.

170. See *supra* notes 161-62 and accompanying text for the Supreme Court's holding in *Sandstrom* that both a conclusive presumption and a burden-shifting inference unconstitutionally relieve the prosecution of proving the element of intent.

171. See *supra* note 166 and accompanying text for language in the *Sandstrom* opinion which asserts that a burden-shifting inference shifts the burden of proof to the defendant on the element of intent.

172. See *supra* notes 117-22 and accompanying text for a discussion of how failure to give an alibi instruction shifts the burden of proof of the defendant's whereabouts to the defendant.

173. See *supra* notes 117-22 and accompanying text for a discussion of why the jury may view the defendant as having the burden to prove his alibi.

174. See *supra* notes 116-22 for a discussion of the consistent positions of the Second, Third, Fourth, Fifth, and Ninth Circuits that a trial court must give the jury an alibi instruction, since failure to do so impermissibly shifts the burden of proof for the alibi to the defendant.

175. See *supra* notes 129-32 and accompanying text for a discussion of empirical studies relating to ability of jurors to understand their instructions.
point the jury in the right direction. This distinction is constitutionally insignificant, however, since in either case the jury is not adequately informed as to the required burden of proof for an element of an offense. Since a burden-shifting Sandstrom instruction is a per se due process error, shifting the burden of proof to the defendant for the mens rea element, it is reasonable to consider a court’s failure to give an alibi instruction as a per se due process error, shifting the burden of proof to the defendant for the actus reus element.

In summary, failure by a trial court to give the jury an alibi instruction is analogous to the giving of a Sandstrom burden-shifting instruction which violates due process. Therefore, failure by a court to give the jury an alibi instruction is a per se due process error.

D. Is a Harmless Error Test Required?

If a trial court’s failure to give the jury an alibi instruction is a per se constitutional error, then the question arises as to whether the error is subject to a test of harmlessness. Constitutional harmless error analysis originated from the conclusion in Chapman v. California that some constitutional errors are not severe enough to require automatic reversal of the defendant’s conviction. Chapman fashioned the rule that a constitutional error is harmless if the government proves, beyond a reasonable doubt, that the error did not contribute to the conviction. The Chapman court gave examples of constitutional violations not susceptible to harmless error review, including denial of counsel at trial, a jury instruction containing an unconstitutional presumption, and a judge having a

177. See id. at 22.
178. See id. at 24. Until 1993, the Chapman harmless error rule was applied to the direct review of state and federal convictions as well as to the collateral review of habeas corpus cases. See Leslie R. Stern, Case Comment, Constitutional Law—Less Onerous Harmless Error Standard Applies on Habeas Corpus Review—Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), 28 Suffolk U. L. Rev. 172, 177 (1994). In Brecht v. Abrahamson, 507 U.S. 619 (1993), however, the Supreme Court established a different harmless error standard for habeas corpus cases on petition from state criminal convictions, namely the test of whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Id. at 622 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Thus, it became more difficult, under Brecht, for a federal court to reverse a criminal conviction based on habeas corpus petition from a state conviction than, under Chapman, to reverse a criminal conviction on direct appeal from a state or federal court.
financial interest in the outcome of the trial.\textsuperscript{179} Prior to \textit{Chapman}, harmless error analysis applied only to non-constitutional errors, since any constitutional error required the reversal of a conviction.\textsuperscript{180}

This section demonstrates, by a two-step argument, that a per se constitutional error due to a trial court’s failure to give an alibi instruction is subject to a harmless error test. First, failure to give an alibi instruction is a burden-shifting error.\textsuperscript{181} Second, a burden-shifting error requires a test of harmlessness, which follows from \textit{Stump v. Bennett},\textsuperscript{182} as well as from \textit{Sandstrom v. Montana}\textsuperscript{183} and \textit{Rose v. Clark}.\textsuperscript{184}

\textit{Stump} held that an instruction to the jury that the defendant must prove his alibi by a preponderance of the evidence unconstitutionally shifts the burden of persuasion for the alibi to the defendant.\textsuperscript{185} In addition to declaring the flawed instruction to be a constitutional error, the \textit{Stump} court performed a \textit{Chapman} harmless error analysis to decide that the error was not harmless.\textsuperscript{186} Thus, the erroneous burden-shifting alibi instruction in \textit{Stump} required a harmless error test.

\textit{Sandstrom} held that an instruction to the jury that a person intends the ordinary consequences of his voluntary acts unconstitutionally shifts the burden of proof to the defendant on the element of intent.\textsuperscript{187} The \textit{Sandstrom} opinion declined to decide, however, whether such error could ever be harmless.\textsuperscript{188} In considering the same issue, the Supreme Court was equally divided in \textit{Connecticut}

\begin{itemize}
\item 179. \textit{See Chapman}, 386 U.S. at 43-44 (Stewart, J., concurring).
\item 180. \textit{See} Stern, supra note 178, at 176.
\item 181. \textit{See} supra notes 117-22 and accompanying text for a discussion of how failure to give an alibi instruction shifts the burden of proof of the alibi to the defendant.
\item 182. 398 F.2d 111 (8th Cir. 1968). \textit{See} supra Part III.A for a discussion of \textit{Stump}, which held that an instruction to the jury, that a defendant has the burden of proving his alibi by a preponderance of the evidence, shifts the burden of proof for the alibi to the defendant in violation of the Due Process Clause.
\item 183. 442 U.S. 510 (1979). \textit{See} supra Part III.C for a discussion of \textit{Sandstrom}, which held that an instruction to the jury, that a defendant charged with deliberate homicide is legally presumed to intend the ordinary consequences of his voluntary acts, shifts the burden of proof on the element of intent to the defendant in violation of the Due Process Clause.
\item 184. 478 U.S. 570 (1986). \textit{See} infra notes 191-201 for a discussion of \textit{Rose}, which held that a \textit{Sandstrom} error is subject to harmless error review.
\item 185. \textit{See Stump}, 398 F.2d at 113, 116, 120.
\item 186. \textit{See} id. at 121-23.
\item 188. \textit{See} id. at 526-27.
\end{itemize}
v. Johnson, 189 on the question of whether a Sandstrom error is subject to a test of harmless error. 190 Rose v. Clark 191 finally resolved the issue by finding burden-shifting Sandstrom errors to be subject to Chapman harmless error analysis. 192 In Rose, the defendant was accused of second-degree murder, which required proof of malice under Tennessee law. 193 The trial court instructed the jury that "'[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption [and] . . . if the State has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously.'" 194 The trial court found the defendant guilty of second-degree murder and the Tennessee Court of Criminal Appeals affirmed. 195 On habeas corpus review, the federal district court held that the instruction, which created the presumption of malice, was a Sandstrom error that violated due process by shifting the burden of proof to the defendant on the element of malice. 196 The Court of Appeals for the Sixth Circuit affirmed the conviction, but concluded that the error was not harmless because the defendant had contested the issue of malice during the trial. 197 After granting certiorari on the harmless error issue, the United States Supreme Court reversed and remanded the case for the Court of Appeals to determine whether the error was harmless. 198 The Supreme Court reasoned that "an instruction that impermissibly shift[s] the burden of proof on malice . . . is not 'so basic to a fair trial' that it can never be harmless" 199 since there may nevertheless be sufficient evidence to prove beyond a reasonable doubt that each element of the charged offense has been satisfied. 200 In cases of Sandstrom errors, the Court viewed the inquiry to be "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reason-

192. See id. at 579-80.
193. See id. at 574.
194. Id. (quoting a portion of the jury instructions).
195. See id.
196. See id. at 574-75.
197. See id. at 575.
198. See id. at 584.
199. Id. at 580 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)).
200. See id.
able doubt that the jury would have found it unnecessary to rely on
the presumption."201

Since failure to give an alibi instruction is an unconstitutional
burden-shifting error, the preceding discussion of Stump and Rose
supports the view that the error is subject to a test of harmlessness.
Thus, the "per se error" approach requires application of a harm­
less error test to the per se constitutional error of failing to give the
jury an alibi instruction.

IV. SUPPORT FOR THE "CONDITIONAL ERROR" APPROACH BY
ANALOGY TO PRESUMPTION OF INNOCENCE

The legal analysis in this Part supports the position that a trial
court's failure to give the jury an alibi instruction is a conditional
constitutional error. This Part reviews Supreme Court decisions on
whether a presumption of innocence instruction is constitutionally
required, and relates the results of this analysis, by analogy, to the
issue of whether an alibi instruction is constitutionally required.

Part IV.A provides an introduction to the presumption of inno­
ce. Part IV.B describes the principal presumption of innocence
cases, namely Taylor v. Kentucky202 and Kentucky v. Whorton,203
that develop a "conditional error" theory based on a "totality of
circumstances" test for determining whether a trial court's refusal
to give a presumption of innocence instruction to the jury violates a
defendant's due process rights. This section also reviews recent
opinions of the United States Supreme Court and United States
Courts of Appeals which contain divergent views on whether the
"totality of circumstances" test still applies. This analysis neverth­
less concludes that the "totality of circumstances" test is the prevail­
ing test for whether a court's refusal to give a presumption of
innocence instruction violates a defendant's due process rights.

Part IV.C provides support for the analogy between alibi in­
structions and presumption of innocence instructions, but notes
meaningful distinctions between the two types of instructions. This
section also argues that the "totality of circumstances" test used in
the principal case of Kentucky v. Whorton204 for constitutionality
for presumption of innocence instructions is the appropriate "con­

201. Id. at 583 (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983) (Pow­
ellt, J., dissenting)).
203. 441 U.S. 786 (1979).
204. 441 U.S. 786 (1979).
ditional error” test for constitutionality for alibi instructions. Part IV.D contends that the determination of constitutional error by a “totality of circumstances” test under a “conditional error” approach is not subject to a test of harmlessness.

A. Introduction to Presumption of Innocence

The presumption of innocence requires the jury to view a defendant as innocent until proven guilty. Thus, the jury must decide the guilt or innocence of the defendant only from the evidence introduced at trial and not from “official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.”

The presumption of innocence is fundamental to American criminal justice. In 1895, the Supreme Court stated the following: “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” The presumption of innocence is a fair trial right under the Due Process Clause that is expressed through the reasonable doubt standard of proof.

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205. See id. at 790 (Stewart, J., dissenting).
206. Taylor, 436 U.S. at 485. The following presumption of innocence instruction illustrates how this doctrine is to be understood.

The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a “clean slate”—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant’s guilt after careful and impartial consideration of all the evidence in the case.


208. See id. (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” (citations omitted)).

B. Development of Case Law for Presumption of Innocence Instructions

1. Principal United States Supreme Court Cases

The United States Supreme Court, in *Taylor v. Kentucky*, held that the defendant's due process rights were violated by the trial court's failure to give the jury a presumption of innocence instruction. In stressing that a defendant has a right to be judged by the jury only from the evidence introduced at trial, the Supreme Court noted three significant instances in which the jury heard facts not introduced in evidence that necessitated an instruction to alert the jury to decide the defendant's innocence or guilt only on the evidence. Although the trial court instructed the jury that proof beyond a reasonable doubt is required for conviction, the Supreme Court emphasized that a reasonable doubt instruction does not alert the jury to the need for judging the defendant solely on admitted evidence, and certainly did not compensate for lack of

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211. See id. at 490. The defendant was convicted in a Kentucky state court for robbery. See id. at 479-81. At trial, the court instructed the jury that the government has the burden of proving the defendant's guilt beyond a reasonable doubt, but denied the defendant's request for an instruction on the presumption of innocence. See id. at 480-81. The Kentucky Court of Appeals affirmed the defendant's conviction and the Supreme Court of Kentucky refused to grant further review. See id. at 482-83. The United States Supreme Court granted certiorari and held that the defendant was denied due process by the trial court's refusal to give a presumption of innocence instruction. See id. at 490.

212. See id. at 485-86.

213. First, the prosecutor stated in his closing argument that the defendant, "'like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proved guilty beyond a reasonable doubt.'" Id. at 486 (quoting prosecutor's closing argument). The *Taylor* Court considered this statement to have "linked petitioner to every defendant who turned out to be guilty and was sentenced to imprisonment. It could be viewed as an invitation to the jury to consider petitioner's status as a defendant as evidence tending to prove his guilt." Id. at 486-87.

Second, the prosecutor stated that "'[o]ne of the first things defendants do after they rip someone off, they get rid of the evidence as fast and as quickly as they can.'" Id. at 487 (quoting prosecutor's closing argument). According to the *Taylor* Court, this statement "implied that all defendants are guilty and invited the jury to consider that proposition in determining petitioner's guilt or innocence." Id.

Third, the prosecutor stated in his opening statement that the victim of the robbery took out a warrant against the defendant and that the grand jury indicted the defendant. See id. Then the prosecutor read the indictment to the jury. See id. From this, the *Taylor* Court reasoned that "the jury not only was invited to consider the petitioner's status as a defendant, but also was permitted to draw inferences of guilt from the fact of arrest and indictment." Id.
a presumption of innocence instruction in the circumstances of Taylor.214

One year later, in Kentucky v. Whorton,215 the Supreme Court construed the Taylor holding to be limited to the facts of the Taylor case, and held that it is a conditional requirement, not an absolute requirement, of the Due Process Clause for a court to give the jury a presumption of innocence instruction.216 The Supreme Court in Whorton established the rule that failure by a trial court to give the jury a presumption of innocence instruction violates the Constitution if, in light of the “totality of the circumstances,” the defendant did not receive a fair trial.217 According to Whorton, the totality of the circumstances include the totality of instructions to the jury, the evidence offered, the prosecutor's remarks to the jury, and other relevant factors.218

214. See id. at 488.
216. See id. at 789. The defendant was found guilty of robbery by a Kentucky trial court. See id. at 788. The Kentucky Supreme Court reversed the conviction for failure of the trial court to give the defendant's requested presumption of innocence instruction. See id. The Kentucky Supreme Court, in reliance on the United States Supreme Court holding in Taylor, assumed that a trial court's failure to give a presumption of innocence instruction to the jury is a per se violation of a defendant's constitutional due process rights. See id. The United States Supreme Court granted certiorari and concluded that the Kentucky Supreme Court did not correctly interpret Taylor. See id. The United States Supreme Court explained that the Taylor holding was limited to the facts of Taylor, which included weak evidence against the defendant and the prosecutor's remark to the jury that "tended to establish [the defendant's] guilt [and] created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." Id. at 789 (quoting Taylor, 436 U.S. at 487-88).

The United States Supreme Court remanded the case to the Kentucky Supreme Court to apply a "totality of the circumstances" test, see infra note 217, to determine whether the trial court's failure to give a presumption of innocence instruction deprived the defendant of his constitutional due process right. See Whorton, 441 U.S. at 789-90. On remand, the Kentucky Supreme Court, applying the "totality of circumstances" test, held that the trial court's refusal to instruct the jury on the presumption of innocence did not violate Whorton's due process right to a fair trial. See Whorton v. Kentucky, 585 S.W.2d 388, 389 (Ky. 1979).

217. The Supreme Court, in Whorton, came to the following conclusion: [T]he failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under Taylor, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.

Whorton, 441 U.S. at 789.

218. See supra note 217 for a statement of the "totality of circumstances" test announced by the Whorton Court. The Duckett test for determining whether failure to give an alibi instruction violates due process is nearly as comprehensive as the Whorton
2. Recent United States Supreme Court Cases

In the years immediately following Whorton, federal courts of appeals applied the "totality of circumstances" test to cases in which the trial court failed to give a presumption of innocence instruction to the jury. In the last decade, however, the United States Supreme Court and federal courts of appeals have stated differing and inconsistent views of what the law is when a trial court refuses to give the jury a presumption of innocence instruction.

In 1991, in Arizona v. Fulminante, the United States Supreme Court listed a multitude of constitutional errors, including a court's failure to instruct the jury on presumption of innocence, that are not reversible per se, but are subject to harmless error analysis.

Since this Court's landmark decision in Chapman v. California, 386 U.S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. See, e.g., ... Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence) ... .

From this clear pronouncement in Fulminante, it might appear that Fulminante transformed the Whorton holding from a "conditional error" approach, based on a "totality of circumstances" test, to a "per se error" approach that includes a test for harmlessness. Never-

219. See United States v. Hollister, 746 F.2d 420, 424 (8th Cir. 1984) (stating that a presumption of innocence instruction was not required because "the weight of the evidence against [the defendant] was strong" and "the prosecutor did not attempt to make improper arguments to the jury"); United States v. Ruppel, 666 F.2d 261, 274-75 (5th Cir. 1982) (holding that "we are unwilling to believe that the jury retired to deliberate less than fully aware of the presumption of innocence," since the trial court instructed the jury on presumption of innocence at the onset of the trial and referred to these instructions at the close of the trial; in addition, the defense counsel explained presumption of innocence to the jury during his closing argument); United States v. DeJohn, 638 F.2d 1048, 1057-58 (7th Cir. 1981) (stating that the purpose of a presumption of innocence instruction was served by the reasonable doubt instruction given to the jury and that the introduction of "similar bad acts" evidence was offered by the prosecution for a proper purpose and did not constitute extrinsic evidence heard by the jury).

221. Id. at 306-07.
ertheless, this reinterpretation of *Whorton* is dictum and does not formally overrule *Whorton*.

Two years after *Fulminante*, the United States Supreme Court, in *Delo v. Lashley*,222 reiterated, in dictum, the original *Whorton* holding that “the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense”223 and that “[a]n instruction is constitutionally required only when, in light of the totality of the circumstances, there is a ‘genuine danger’ that the jury will convict based on something other than the State’s lawful evidence . . . .”224

Since *Fulminante* and *Lashley* each expressed views in *dictum* regarding the appropriate legal theory for determining whether a trial court’s failure to give a presumption of innocence instruction is a due process error, *Fulminante* does not overrule *Whorton*, and *Lashley* does not affirm *Whorton*. Admittedly, the Supreme Court in *Fulminante* categorized a trial court’s failure to give the jury a presumption of innocence instruction as a per se constitutional error subject to harmless error review.225 In spite of *Fulminante*, however, and notwithstanding recent federal appellate cases that support the view stated in *Fulminante*,226 the prevailing rule is that

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223. *Id.* at 278 (citing Kentucky v. *Whorton*, 441 U.S. 786, 789 (1979)).
224. *Id.* (citing and quoting *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978)).
225. *See supra* note 221 and accompanying text for the pertinent language in *Fulminante*.

The conflicting views within the Ninth Circuit as reflected in *Thornton* and *Boyland*, with respect to which theory applies to the analysis of whether a presumption of innocence instruction is constitutionally required, is possibly due to the fact that *Thornton* was decided later in 1994 than was *Boyland* and may reflect a change in views in the Ninth Circuit. *Thornton* was decided on September 1, 1994, while *Boyland* was decided on February 14, 1994. *See supra* preceding paragraph. Nevertheless, *Thornton* did not cite *Boyland*. Alternatively, these conflicting views may represent an intra-circuit split inasmuch as different panels of judges heard *Boyland* and *Thornton*. The judges on the *Boyland* panel were Schroeder, Canby, and Wiggins. *See Boyland*, 1994 WL 43168. The judges on the *Thornton* panel were Norris, Thompson, and Trott. *See Thornton*, 1994 WL 475860. Only one of these six judges (Thompson) was on the panel of
failure to give a presumption of innocence instruction is subject to a “conditional error” test for constitutionality.

C. Implication for Alibi Instructions

1. The Analogy

The presumption of the defendant’s innocence and the defendant’s alibi defense have analogous constitutional roles in a criminal trial. There are four factors in support of the analogy. First, the presumption of innocence and the defendant’s alibi theory of defense are both constitutional rights which directly stem from the right to a fair trial227 under the Due Process Clauses of the Fifth and Fourteenth Amendments.228

Second, both the presumption of innocence and an alibi defense are related in similar ways to the reasonable doubt burden of proof. A defendant’s presumed innocence is sufficient to acquit the defendant until a jury is otherwise convinced by the prosecution’s proof beyond a reasonable doubt that the defendant is guilty.229 Similarly, a defendant’s alibi defense is sufficient to acquit the defendant until a jury is otherwise convinced by the prosecution’s proof beyond a reasonable doubt that the defendant was at the scene of the crime when the crime occurred and was not where the defendant claimed to be.230

Third, both a presumption of innocence instruction and an alibi instruction direct the jury’s attention to jury responsibilities that are not obvious from a reasonable doubt instruction. A presumption of

227. The presumption of innocence is a fair trial right under the Due Process Clause. See supra note 208 and accompanying text. A criminal defendant has a fair trial right to present a complete defense. See supra note 23 and accompanying text.

228. See supra note 22 for support of the right to a fair trial under the Due Process Clause.


230. An alibi is a complete defense which, if established, is conclusive evidence of the defendant’s innocence. See supra note 41 and accompanying text. The prosecution has the burden of disproving the alibi. See supra notes 48-49 and accompanying text. The weight of the prosecution’s burden is proof beyond a reasonable doubt. See supra note 141 and accompanying text.
innocence instruction makes the jury aware of its duty to assess
guilt beyond a reasonable doubt solely on facts admitted into evi­
dence and not on extrinsic facts that come to the jury’s attention.231
Similarly, an alibi instruction makes the jury aware of its duty to
assess the alibi in terms of the prosecution’s burden to disprove it
beyond a reasonable doubt and not on the defendant’s burden to
prove it.232

Fourth, both a presumption of innocence instruction and an al­
ibi instruction respond to factors in a trial which are extrinsic to the
instruction. A presumption of innocence instruction counteracts
the effect of non-evidentiary facts presented to the jury.233 Simi­
larly, an alibi instruction negates any inclination that the jury might
have to require the defendant to prove the truth of the alibi that the
defendant offers as a defense.234 Both of these instructions differ
from a Sandstrom instruction, which is intrinsically defective.235

Nevertheless, the analogy is not perfect and there are pertinent
distinctions between the presumption of innocence and the defend­
ant’s alibi defense. The presumption of innocence relates to the
jury’s frame of mind regarding the defendant’s innocence without
regard to the specific elements of the charged offense.236 An alibi
defense, on the other hand, pertains to a specific element of the
offense, namely the actus reus element, relating to the whereabouts
of the defendant when the crime was committed.237 Since the alibi
defense is linked with an element of the offense, failure to give the
alibi instruction directly impacts the burden of proof for the ele­
ment, which in turn can be devastating to a defendant who is rely­
ing primarily on the alibi to support his innocence.238 Failure to

231. See supra note 206 for the text of a presumption of innocence instruction
which directs the jury to acquit the defendant in the absence of sufficient evidence of
the defendant’s guilt beyond a reasonable doubt.
232. See supra notes 48-49 and accompanying text for the proposition that the
prosecution has the burden of disproving the defendant’s alibi.
233. See supra note 206 for a presumption of innocence instruction which bars
the jury from utilizing non-evidentiary facts in its determination of guilt or innocence.
234. See supra notes 48-49 and accompanying text for support for the proposition
that the prosecution has the burden of disproving the defendant’s alibi.
235. A Sandstrom instruction is constitutionally flawed because of the text within
the instruction itself. See supra Part III.C for a discussion of Sandstrom instructions
and why they violate due process.
236. See supra note 205 and accompanying text for a statement of how the jury
must view the defendant’s innocence.
237. See supra note 2 for a definition of an alibi defense.
238. An alibi negates the actus reus element of an alleged offense. See supra note
21 and accompanying text.
give the presumption of innocence instruction, on the other hand, does not negatively impact the defendant in as singular a manner as does failure to give an alibi instruction.\textsuperscript{239} Therefore, failure to give the presumption of innocence instruction lacks the particularized effect on the case that failure to give an alibi instruction may have. In addition, the presumption of innocence relates to non-evidentiary facts that the jury may hear, but must not consider even if the evidence of either the prosecution or the defendant validates those facts.\textsuperscript{240} In contrast, the defendant's alibi is admissible evidence of the defendant's whereabouts, which the jury must consider.\textsuperscript{241}

The preceding arguments suggest that presumption of innocence instructions and alibi instructions have analogous constitutional roles in a criminal trial despite some distinctions between these instructions. Based upon this analogy, presumption of innocence instructions and alibi instructions should follow the same rule as to whether a trial court's failure to instruct the jury is a constitutional error.

2. The Conditional Error Test

To the extent that alibi instructions are analogous to presumption of innocence instructions, failure by a trial court to give the jury an alibi instruction is a due process error that should be subject to a test that is consistent with the \textit{Whorton} rule.\textsuperscript{242} The appropriate constitutional error test for failure to give an alibi instruction is the "totality of circumstances" test of \textit{Whorton}, rather than the more focused test of \textit{Duckett}. This is because the \textit{Whorton} test considers all circumstances of the trial that could result in an unfair trial when the instruction is not given, whereas the \textit{Duckett} test considers most, but not all, of the pertinent circumstances that impact the defendant's right to a fair trial.\textsuperscript{243} Both tests include factors of the totality of instructions to the jury and the weight of the evidence against the defendant.\textsuperscript{244} The additional factor in the \textit{Whorton} test

\textsuperscript{239} See \textit{supra} note 206 for an example of a presumption of innocence instruction.

\textsuperscript{240} See \textit{supra} note 206 and accompanying text for the requirement that the jury must consider only evidence admitted at trial in its determination of guilt or innocence.

\textsuperscript{241} See \textit{supra} note 2 for a definition of an alibi.

\textsuperscript{242} See \textit{supra} note 217 for a declaration of the \textit{Whorton} rule.

\textsuperscript{243} See \textit{supra} text accompanying notes 218 and 90 for the circumstances that characterize the \textit{Whorton} test and \textit{Duckett} test, respectively.

\textsuperscript{244} See \textit{supra} text accompanying notes 218 and 90 for the circumstances that characterize the \textit{Whorton} test and \textit{Duckett} test, respectively.
of the prosecutor's remarks to the jury should also apply to the alibi instruction test. For example, if a prosecutor told the jury that all defendants who commit crimes fabricate alibis, the resultant prejudice would seem to undermine the alibi defense to the same extent as the prosecutor's remark that "defendants ... after they rip someone off ... get rid of the evidence as fast ... as they can" undermined the presumption of innocence in Taylor. Accordingly, the appropriate test under this line of analysis is that failure by a court to give a requested alibi instruction is a due process constitutional error if, in light of the totality of the circumstances, the defendant did not receive a fair trial. The circumstances include the totality of instructions to the jury, the evidence introduced at trial, the prosecutor's remarks to the jury, and all other relevant factors.

D. Is a Harmless Error Test Required?

If a trial court's failure to give the jury an alibi instruction is a constitutional error based on the results of a "totality of circumstances" test, then a harmless error test is not required. This position is consistent with Taylor, in which the defendant's conviction was reversed, without a harmless error analysis, by application of a "totality of circumstances" test to the trial court's failure to give the jury a presumption of innocence instruction. The proposition that a harmless error inquiry is not needed with the "conditional error" approach is supported by the relationship between the "conditional error" test and the harmless error test. With the "conditional error" test, the defendant has the burden of proving that he was deprived of a fair trial, or equivalently, that the verdict was affected by the court's failure to give the alibi

245. See supra text accompanying note 218 for the circumstances that characterize the Whorton test.
247. The Whorton opinion, which never discussed the issue of harmless error, stated that the "totality of circumstances" test is derived from the Taylor court holding that, based on the facts of the Taylor case, the Taylor trial court violated the defendant's due process rights by refusing to give a presumption of innocence instruction. See Whorton, 441 U.S. at 789. Yet, the Taylor Court reversed the defendant's conviction on grounds of constitutional error without inquiring as to whether such error was harmless. This implies that Whorton viewed the "totality of circumstances" test as requiring reversal without the need for a Chapman harmless error inquiry when the test determines that a court's failure to give a presumption of innocence instruction is a due process error. Extending this concept by analogy, there is no need for a harmless error test when a "totality of circumstances" test determines that failure to give an alibi instruction is a constitutional error. See supra Part IV.C.1 for arguments in support of the analogy between alibi instructions and presumption of innocence instructions.
With the harmless error test, the prosecution must prove beyond a reasonable doubt that the verdict was unaffected by the court’s failure to give the alibi instruction. Consequently, if the defendant establishes that failure to give the instruction deprived him of a fair trial, then the error could not have been harmless since the prosecution will necessarily be unable to prove beyond a reasonable doubt that the error did not affect the verdict. In other words, the outcome of the harmless error test is linked to the “conditional error” test for constitutionality in a way that makes a harmless error test redundant and unnecessary.

V. Weighing the “Per Se Error” and “Conditional Error” Approaches

The Whorton holding supports the use of a “conditional error” approach based on a “totality of circumstances” test because of an analogy between alibi instructions and presumption of innocence instructions. The analogy is not perfect, however, since the alibi focuses directly on an element of the charged offense which the prosecution must prove, while the presumption of innocence relates to the general frame of mind of the jury regarding the defendant’s presumed innocence. In addition, an alibi is admissible evidence

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248. Under a “conditional error” theory, the test for constitutional error determines, in light of the totality of the circumstances, whether the defendant received a fair trial. See supra Part IV.C.2 for the recommended formulation of this test for alibi instructions. This is equivalent to a test of whether the verdict would have been affected had the alibi instruction been given. See Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, a convicted defendant in a capital punishment case alleged ineffective assistance of counsel during the sentencing hearing, in violation of the Sixth Amendment. See id. at 671. The Supreme Court held that the contested conduct by the defendant’s counsel is subject to a conditional error test which “requires the defendant to show that there is a reasonable probability that, but for counsel’s unprofessional conduct, the result of the proceeding would have been different,” id. at 694, or equivalently, “that counsel’s errors were so serious as to deprive the defendant of a fair trial.” Id. at 687. The court viewed the capital sentencing hearing as indistinguishable from an ordinary trial. See id. Thus, under Strickland, if a defendant alleges on appeal that a constitutional error occurred during the trial, where the alleged error is subject to a “conditional error” test for constitutionality, then the defendant has the burden of demonstrating a reasonable probability that a constitutional error occurred.

249. The test for harmless error requires the prosecution to prove beyond a reasonable doubt that the error did not contribute to the conviction. See supra text accompanying note 178.

250. See supra note 217 for the Whorton Court’s formulation of the “totality of circumstances” test for determining whether a trial court’s failure to give the jury a presumption of innocence instruction is a constitutional error.

251. See supra Part IV.C.1 for arguments in support of the analogy.

252. See supra Part IV.C.1 for a discussion of this distinction.
which the jury must consider, whereas the presumption of innocence relates to non-evidentiary facts which the jury must disregard.\textsuperscript{253}

On the other hand, the "per se error" approach makes sense in view of three strong arguments. First, a trial court's failure to give an alibi instruction unconstitutionally shifts the burden of proof to the defendant.\textsuperscript{254} Second, the alibi instruction is analogous to the reasonable doubt instruction and failure to give a reasonable doubt instruction is a per se due process error.\textsuperscript{255} Third, alibi instructions are analogous to \textit{Sandstrom} burden-shifting instructions.\textsuperscript{256} While a \textit{Sandstrom} instruction unconstitutionally shifts the burden of proof as to the mens rea element regarding the defendant's intent,\textsuperscript{257} failure to give an alibi instruction shifts the burden of proof as to the actus reus element regarding the defendant's whereabouts.\textsuperscript{258} Nevertheless, the analogy between alibi instructions and \textit{Sandstrom} instructions is not perfect, since an alibi instruction relates to the prosecution's burden of proving facts which concern the defendant's alibi\textsuperscript{259} and are extrinsic to the instruction, while a \textit{Sandstrom} instruction relates to a defect in the instruction itself.\textsuperscript{260}

The preceding discussion reveals that both the "conditional error" approach and the "per se error" approach have merit. On balance, however, this Note favors the "per se error" approach which is supported by three strong arguments that complement one another. The reality that a trial court's failure to give an alibi instruction may unconstitutionally shift the burden of proof to the defendant is especially troublesome in light of the deference which the Constitution gives to a criminal defendant in matters relating to

\textsuperscript{253} See \textit{supra} Part IV.C.1 for a discussion of this distinction.

\textsuperscript{254} See \textit{supra} Part III.A for analysis in support of the contention that failure to give an alibi instruction unconstitutionally shifts the burden of proof to the defendant.

\textsuperscript{255} See \textit{supra} Part III.B for a discussion of the analogy between an alibi instruction and a reasonable doubt instruction.

\textsuperscript{256} See \textit{supra} Part III.C for a discussion of the analogy between an alibi instruction and a \textit{Sandstrom} burden-shifting instruction.

\textsuperscript{257} See \textit{supra} note 166 and accompanying text for the holding in \textit{Sandstrom} that a burden-shifting inference shifts the burden of proof to the defendant on the element of intent.

\textsuperscript{258} See \textit{supra} notes 117-22 and accompanying text for a discussion of why failure to give an alibi instruction shifts the burden of proof of the defendant's whereabouts to the defendant.

\textsuperscript{259} See \textit{supra} notes 2-3 and accompanying text for the definition and purpose of an alibi instruction.

\textsuperscript{260} A \textit{Sandstrom} instruction is constitutionally flawed because of the text within the instruction itself. See \textit{supra} Part III.C for a discussion of \textit{Sandstrom} instructions and why they violate due process.
the burden of proof for elements of an alleged offense. Thus, the need to protect the reasonable doubt standard of proof required of the prosecution for the defendant's alibi, which relates directly to the actus reus element, seems compelling. In contrast, the "conditional error" approach depends entirely on the analogy between alibi instructions and presumption of innocence instructions. A relevant imperfection in the analogy is that failure to give an alibi instruction may be devastating to a defendant who is relying primarily on the alibi to support his innocence, whereas failure to give a presumption of innocence instruction is unlikely to have as particularized an effect on the outcome of the trial. In addition, a "conditional error" approach carries the risk that a trial judge may incorrectly assess the totality of circumstances when deciding not to give an alibi instruction and the defendant may not prevail on appeal because the defendant bears the burden of proving that the trial judge erred. This risk of denying the defendant a fair trial is virtually non-existent with a "per se error" approach, since the trial judge will be required to give the instruction unconditionally, and if the judge fails to give the instruction, the prosecution will be required to meet the stringent standards of the Chapman harmless error test in order to avert a reversal of the conviction. Accordingly, this Note concludes that a trial court's failure to give a requested alibi instruction, where there is evidentiary support for the alibi, is a per se constitutional error subject to harmless error review.

**Conclusion**

This Note proposes that a trial court's failure to give a requested alibi instruction, where there is evidentiary support for the

261. See *supra* notes 137-41 for a discussion of the constitutional requirement that the prosecution prove guilt beyond reasonable doubt for each element of an alleged crime.  
262. See *supra* text accompanying note 21 for the proposition that the alibi serves to negate the actus reus element of an offense.  
263. See *supra* Part IV for support of a "conditional error" approach based on analogy between alibi instructions and presumption of innocence instructions.  
264. See *supra* text accompanying notes 238-39 for a discussion of this distinction.  
265. See *supra* note 248 for the proposition that if a defendant alleges on appeal that a constitutional error occurred during the trial, where the alleged error is subject to a "conditional error" test for constitutionality, then the defendant has the burden of demonstrating a reasonable probability that a constitutional error occurred.  
266. The test for harmless error requires the prosecution to prove beyond a reasonable doubt that the error did not contribute to the conviction. See *supra* note 178 and accompanying text.
alibi, is a per se constitutional error subject to harmless error review. The error is harmless if the government proves beyond a reasonable doubt that failure to give the instruction did not contribute to the conviction.

The prosecution must bear the burden of proof for the defendant’s guilt for each element of the charged offense. Since an alibi directly negates the actus reus element, this burden is not diminished as to the defendant’s alibi and may not be shifted to the defendant. Accordingly, a defendant who advances an alibi defense with evidentiary support has an unconditional due process right to a jury instruction as to the prosecution’s burden of proof for the alibi.

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